

No. 49580-5-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

BRIANNA P. CHANDLER, as personal representative
for estate of KAHIL M. MARSHALL,
Appellants/Plaintiffs,

v.

THE STATE OF WASHINGTON; DEPT. OF TRANSPORTATION,
SHELTON SCHOOL DISTRICT #309, a municipal corporation;
SUZAN J. MONTANO-FELTON and JOHN DOE MONTANO-
FELTON, husband and wife and their marital community comprised
thereof; NATHEN R. WRIGHT and JANE DOE WRIGHT,
husband and wife and the marital community comprised thereof, et al.

Respondents/Defendants.

APPELLANT'S BRIEF

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I. INTRODUCTION

This is a personal injury case brought by the Plaintiff BRIANNA CHANDLER on behalf of the Estate of KAHIL MARSHALL that stems from a motor vehicle collision between co-defendants NATHAN WRIGHT and a SHELTON SCHOOL DISTRICT #309, hereinafter SHELTON SCHOOL DISTRICT, school bus operated by employee and co-defendant SUZAN MONTANO-FELTON. The jury found that defendant SUZAN MONTANO-FELTON was not negligent; that defendant SHELTON SCHOOL DISTRICT was negligent, but that neither were negligent as a proximate cause of injury to the Plaintiff. A default judgment was entered against Defendant NATHAN WRIGHT. The jury failed to address any damages and the division between the parties whatsoever and it is irreconcilable.

II. ASSIGNMENTS OF ERROR

- A. The trial court erred when it failed to find Defendant Suzan Montano-Felton was negligent despite finding Shelton School District negligent

herein, and failed to find that said negligence was a proximate cause of injury and damage in the death of Kahil Marshall.

- B. The trial court erred when it used language on the Special Verdict form that established a bias as to defendant Nathan Wright.
- C. The trial court further erred when it failed to make any award of damages based on their special verdict.
- D. The trial court erred in not setting aside the jury verdict and entering a judgment notwithstanding the Verdict or in the alternative, grant plaintiff a new trial.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Did the trial court err in finding defendant Suzan Montano-Felton not negligent, a verdict not supported by substantial evidence, and by not finding that said negligence of both defendants Suzan Montano-Felton and Shelton School District was a proximate cause of injury and damage in the death of Kahil Marshall, a verdict supported by substantial evidence?
- B. Did the trial court err in including specific language on the Special Verdict Form that created bias by the jury toward defendant Nathan Wright?
- C. Did the trial court err in not making an award, based on each defendant's negligence with regard to the injury and damages suffered by plaintiff?
- D. Did the trial court err in denying Plaintiff's motion for an Order Setting Aside the Jury Verdict and entering a Judgment

Notwithstanding the Verdict or in the alternative, granting Plaintiffs a new trial?

IV. STATEMENT OF THE CASE

On the morning of October 27, 2010, defendant, SUZAN MONTANO-FELTON was driving defendant SHELTON SCHOOL DISTRICT School Bus No. 120 South on Highway 101 on her regular route.(CP at 541) Consequently, NATHAN WRIGHT was also traveling on Highway 101 from Shelton to Olympia with his girlfriend, KAHIL MARSHALL, who was sitting in the front passenger seat. Mr. Wright was transporting Ms. Marshall to a medical appointment in Olympia, Washington. (CP at 541)

At some point, prior to 6:32 a.m. and prior to its entry into the gusset/turn lane at Hurley-Waldrup road, the school bus changed lanes and was impacted in the left lane by a car driven by defendant Nathan Wright. (CP at 541; CP12 at 511) The vehicle's front-seat passenger, Kahil Marshall, died at the scene upon impact. Mr. Wright was transported to Harborview in Seattle for his injuries. The bus driver, defendant Suzan Montano-Felton, received minor injuries and was treated at the scene and released.

Defendant Nathan Wright was initially convicted under criminal statute for his actions that resulted in Ms. Marshall's death. (CP 110-137)

The court entered a default against him under the civil action herein. (CP at 479) However, the criminal conviction was appealed and his conviction was overturned because the Court found that the State failed to prove the necessary prong under vehicular homicide as it relates to intoxication. (CP 110-137) He was then resentenced by the trial court on a lesser sentence and was released.

The court submitted jury instructions to the jury that included a Special Verdict form that set defendant Nathan Wright apart from the other defendants by containing language that biased the jury against defendant Nathan Wright. (CP at 24-25)

The jury returned a special verdict finding defendant Suzan Montano-Felton not negligent, and finding defendant Shelton School District was negligent on Question 1. On Question 2, they did not find such negligence as a proximate cause of injury and damage to the Plaintiff. Further, the jury did not make any finding or award as to damages with regard to the death of Kahil Marshall despite instructions to the contrary. (CP at 25)

The court denied plaintiff's post-trial motion for a Judgment in spite of the Verdict and/or in the alternative a new trial. (CP at 26-32, at 4, at 5-8)

V. ARGUMENT

A. The trial court in the case at bar erred in finding that Suzan Montano-Felton was not negligent in the exercise of her duties as a school bus driver for Shelton School District for failure to comply with District and state requirements while operating the school bus, including standard driving procedures, use of cell phones, and other distracted-driving practices, which this writer believes provided the perfect atmosphere for the tragedy that occurred on the early morning of October 27, 2010. Kahil Marshall was killed on Highway 101 and the Hurley-Waldrup intersection because the vehicle in which she was the front-seat passenger struck the back of Ms. Montano-Felton's bus when it suddenly switched lanes, slowing to 32 miles per hour without warning. Distracted driving is a growing epidemic across the State of Washington as evidenced by the Governor's recent law prohibiting cell phone usage, beverages and food consumption, and other activities that detract from the driver's number one task—to pay attention to the road and other vehicles around them.

Plaintiff proved that Ms. Montano-Felton was negligent in the operation of her vehicle. She testified at trial that she was very well aware of the dangers of trying to make the crossing at the Hurley-Waldrup intersection; that she wholly focused on gauging the oncoming traffic in the Northbound lanes to avoid having to sit for up to nine minutes before

continuing her route. (Verbatim Report of Proceedings, Volume 2, page 210, lines 6 – 22, page 261, lines 15 – 25, and page 262, lines 1 – 10.) Yet she failed to give equal attention to or exercise reasonable care for the vehicles behind her when she pulled into the left lane and attempted to then turn into the gusset lane without giving the driver in the left lane proper time to react.

Ms. Montano-Felton stated that she was focused only on the northbound traffic, in order to be able gauge her opportunity to make the turn across the Northbound lanes to continue her route. She signed a statement under penalty of perjury not less than 30 minutes after the collision, stating that she was stopped in the gusset, minding her own business and focused on the Northbound traffic so she could make the turn and continue her route. She freely states that she did not see or know of any vehicles behind her.

Evidence was proffered showing Ms. Montano-Felton's consistent disregard for operational rules established by the State of Washington and by Shelton School District #403 when operating defendant Shelton School District's bus prior to that fateful day. She had numerous incidents that created dangerous and/or actually resulted in injurious situations for not only her riders but for those traveling the roadways with her, including pedestrians. (Verbatim Report of Proceedings, Volume 2, page 311, line 19

through page 320, line 16; Volume 3, page 474, line 11 through page 479, line 23;)

Ms. Montano-Felton exhibited autonomous behavior in that she excluded herself from Shelton School District policies. That belief reflects negligence on her part. That negligence contributed to the proximate cause in the injury and damages resulting in the death of Kahil Marshall on October 27, 2010.

Witness, Brittany Trail, testified that she was present when Brian Hutson, lead mechanic, and Sandi Thompson, Transportation director, were interviewed and that it was confirmed by Sandi Thompson and Brian Hutson that Ms. Montano-Felton had been warned prior to October 27, 2010, about unplugging the camera while the bus was in operation, not including one additional incident when it appeared that the plug had been damaged. (Verbatim Report of Proceedings, Volume 3, page 467, line 15 through page 468, line 5.)

Evidence was presented that on the morning of October 27, 2010, Ms. Montano-Felton admits that she began her shift by clocking in at 5:55 a.m. Pursuant to the video images retrieved from the bus, the camera was plugged in and working when she parked the bus in its assigned parking stall on school district property on October 26, 2010. (Verbatim Report of Proceedings, Volume 2, page 206, lines 8 – 19; page 207, lines 12 – 20.)

That same video also proved that the camera worked on October 27, 2010, but not until after it was plugged back into the power source after the accident. (Verbatim Report of Proceedings, page 209, lines 5 – 24. The installed camera recorded both audio and video of the interior of the bus when it was plugged in and operating. (Verbatim Report of Proceedings, Volume 2, page 210, lines 5 – 20 and page 237, lines 21 – 25 through page 238, line 1.)

It is clear to this writer that the camera was specifically unplugged and effectively turned off on the morning of October 27, 2010. There is no reasonable explanation for why it was unplugged on the morning of October 27, 2010. The camera was inspected by the mechanic when it was returned to the bus garage and it was found to be in good working order. No one disputed and no evidence was provided to prove that anyone other than Ms. Montano-Felton entered the bus after she parked it on October 26, 2010 or prior to her beginning her route by 6:00 a.m. on the morning of October 27, 2010. The camera was unplugged and the only person who would benefit from that would be the driver if she did so to avoid detection that she was using her cell phone or violating other school policy while driving Bus No. 120, including the morning of October 27, 2010. It was in good working order except for being unplugged from the power source at the time the bus was impacted by the vehicle driven by Nathan

Wright which prevented the court from knowing what the events leading up to the impact were or how it actually occurred. Given Ms. Montano-Felton's belief that she wasn't required to follow school policy, this writer believes she may have developed a habit of unplugging the camera while on her route on a regular basis prior to the morning of the accident.

The school district had a required rule, an established policy that stated:

4. You should not use your cell phones for personal calls while on duty unless you are on a layover. Tell friends and family they can call our office if there is an emergency.

(Verbatim Report of Proceedings, Volume 2, page 215, lines 7 – 11. Ms. Montano-Felton admitted to using her cell phone to send text messages, stating that she didn't consider it to be a violation of the required policy. (Verbatim Report of Proceedings, Volume 2, page 214, lines 13-25, page 215, lines 1 -19.)

In regard to school policy regarding notifications to students of changes in bus schedules, she regularly by-passed procedure by making direct contact with students rather than having them follow school policy regarding obtaining notifications of changes in bus routes through the school directly. (Verbatim Report of Proceedings, Volume 2, page 215, lines 23- 25, pages 216, lines 1 – 25.)

Ms. Montano-Felton admitted that she made a cell phone call shortly after clocking in at 5:53 a.m. that morning, that she placed a two minute call to her husband at 5:57-- after completing her 15-minute pre-check in four (4) minutes. (Verbatim Report of Proceedings, Volume 2, page 296, line 15 – 22.)

However, it is not clear if she actually completed the required pre-check of her vehicle while she was on the cell phone or if she by-passed the required pre-check and started her route as she completed her call. The required written pre-check report was never found, despite the requirement that it remain with the bus until the end of the day when she was to turn it into her supervisor. At the time of trial, she could not explain why the pre-check report does not exist despite being on the same clipboard with her time card, route spreadsheet and other pertinent information which were preserved.(Verbatim Report of Proceedings, Volume 2, page 310, line 14 through page 311, line 12.)

It was noted in evaluations completed by supervisors or ride check writers prior to October 27, 2010, that she didn't complete the required report on more than one occasion. It was also noted that she used a hands-free device (Bluetooth) to send and receive calls while driving. (Verbatim Report of Proceedings, Volume 2, page 251, lines 3 – 25, page 252, lines 1 – 25, and page 253, lines 1 - 20.)

Evidence was entered that reflected Ms. Montano-Felton's consistent disregard for school and state policy regarding cell phone use while operating a motor vehicle, namely Bus No. 120. It was established that she regularly made phone calls and/or sent text messages while on duty and executing her bus route. (Verbatim Report of Proceedings, Volume 2, page 241, lines 20 – 25 and page 242, lines 1 – 25, page 243, lines 1 – 11.)

Ms. Montano-Felton received written warnings prior to the collision that caused the death of Kahil Marshall from her supervisor for talking on her cell phone while operating Bus 120. The supervisor made it clear that the phone was not to be used or even turned on while on the bus, but Ms. Montano-Felton decided that she could interpret the rules to suit her own needs. (Verbatim Report of Proceedings, page 246, lines 12 – 25 and page 247, lines 1 – 25, and page 248, lines 1 – 5.)

Ms. Montano-Felton's disregard for those around her is negligence, and that negligence contributed to the death of Kahil Marshall in that she did not exercise the basic standard-of-care required of her as the driver of the school bus, beginning with the unproven Pre-check report on the morning of Ms. Marshall's death before taking the bus out on the road that fateful morning. Ms. Montano-Felton stated under oath that she could not recall unplugging the camera, changing lanes or that she put the

airbrakes on at some point before, during or after the impact. (Verbatim Report of Proceedings, Volume 2, page 256, lines 24-25, page 257, lines 1 – 15.)

In her initial statements immediately after the accident, she certified under oath that she was in the gusset/left turn lane and stopped prior to the impact by Mr. Wright. Her sworn statement made within 30 minutes of the impact, and in a statement, some five days later, she stated that she was stopped in the gusset, watching northbound traffic. (Verbatim Report of Proceedings, Volume 2, page 257, lines 6 – 25, page 258, lines 1 – 25, and page 259, lines 1 – 21.)

In a subsequent statement made thirty-three days later, on or about November 29, 2010, she alters the details of the collision to match information gathered by the Washington State Patrol, specifically that she was in the left lane approximately 100 feet from the gusset, and traveling at about 15 miles per hour at the moment of a second impact; that there was a first impact at 45 miles per hour prior to this point. She then states she was downshifting from fifth to fourth. (Verbatim Report of Proceedings, Volume 2, pages 269, line 16 through page 276, line 9.)

In answer to interrogatories and during her deposition, Ms. Montano-Felton then altered the details to further match Plaintiff's traffic re-constructionist's view of the facts in that she was in the right lane and

then suddenly switched to the left lane, and slowed to approximately 32 miles per hour upon impact. She further added that she was in third gear. At trial, she then testified that she was in the right lane until the top of the hill, that she was going 32, and still only in fourth gear, but that she had pulled the air brake at some point. (Verbatim Report of Proceedings, Volume 2, page 278, lines 10 through page 279, line 25, page 283, line 12 – 20; and page 284, line 15 through 286, line 5.)

The lone eye-witness to this tragic collision, Steven Cole, reported that it was between 6:00-6:30ish a.m. that morning, that it was beginning to get light, enough that he contemplated turning his headlights off. He testified that he traveled that road frequently and that he was accustomed to seeing the bus in the left lane. He testified that he was just past the overpass by Little Creek Casino when the bus moved to the left lane, which was about a mile from the Hurley-Waldrup intersection. He testified that like clockwork “she had just finishing making her left turn or her left—into the left lane from the right, that she routinely has to do that”usually at the bottom of the hill. He testified that there were power lines just before the Hurley-Waldrup intersection, then the road curves to the left, and around the corner it appeared to him the school bus was in the left lane; that the vehicle was behind the school bus, then after a while it hit the school bus. He denied seeing the bus move to the left lane. He

later admits that he was a little ways behind both vehicles and he couldn't see all of the details. (Verbatim Report of Proceedings, Volume 3, page 513, line 6 through 515, line 1; page 516, line 17 -24.)

Evidence was established by the accident re-constructionist, Ed Wells that Mr. Cole could not have seen the vehicles as he described them because it was still too dark to see anything other than the lights on the vehicles; nor that he could make the determination which lane either vehicle had been in prior to the collision because of the curve in the roadway, including any determination about which lane the turn signal pertained to: the gusset or the left drive lane.

It was Mr. Wells's expert opinion that the bus was in the right lane until less than 5.0 seconds prior to suddenly switching to the left lane leaving Nathan Wright without time to notice and then react timely. (Verbatim Report of Proceedings, Volume 1, page 62, line 21 through page 64, line 20, page 66, line 17 – 23, page 81, line 13 through page 82, line 11.)

The court erred in finding that defendants Suzan Montano-Felton and Shelton School District were not negligent and that their negligence was a proximate cause in the injury and damages in regard to the death of Kahil Marshall and ultimately not jointly and severally liable for any damages to be awarded to plaintiffs herein.

Evidence was further provided to prove that Suzan Montano-Felton's supervisor, Sandi Thompson, consistently was negligent in her disregard for monitoring Ms. Montano-Felton's safe-driving habits with regard to use of cell phone while driving the school bus, driving too fast, hitting a pedestrian in a crosswalk, impacting another vehicle and injuring two children on her bus, or not complying with all requirements to maintain her driver status as a commercial school bus driver with the school district. (Verbatim Report of Proceedings, Volume 2, page 350, line 11 through page 352, line 13; page 356, line 5 – page 359, line 4, line 21 through page 363, line 3, line 8 through page 370, line 22; page 373, line 4 through page 379, line 12; page 382, line 1 – 10; page 396, line 7 – 21; Volume 3, page 412, line 18 through page 414, line 12; page 425, line 18 through page 427, line 10; page 428, line 3 – 14; page 438, line 1 – 5, 9 – 21.)

The court found in *Niece v Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (Wash. 1997)

As a general rule, there is no duty to prevent a third party from intentionally harming another unless “ ‘a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party's conduct.’ ” *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wash.2d 217, 227, 802 p.2d 1360 (1991) (quoting *Peterson v. State*, 100 Wash.2d 421, 426, 671 P.2d 230 (1983)); *Lauritzen v. Lauritzen*, 74 Wash.App. 432, 438-39, 874 P.2d 861, review denied, 125 Wash.2d 1006, 886 P.2d 1134 (1994). A duty arises where:

- (a) A special relation exists between the [defendant] and the third person which imposes a duty upon the [defendant] to control the third person's conduct, or
- (b) A special relation exists between the [defendant] and the other which gives the other a right to protection.

(Emphasis added.)

Many special relationships give rise to a duty to prevent harms caused by the intentional or criminal conduct of third parties. For example, a school has a duty to protect students in its custody from reasonably anticipated dangers. *McLeod v. Grant County Sch. Dist.* No. 128, 42 Wash.2d 316, 320, 255 P.2d 360 (1953). See also *J.N. ex rel. Hager v. Bellingham Sch. Dist.* No. 501, 74 Wash.App. 49, 871 P.2d 1106 (1994); *Briscoe v. School Dist. No. 123*, 32 Wash.2d 353, 201 P.2d 697 (1949). The rationale for such a duty--the placement of the student in the [929 P.2d 424] care of the defendant with the resulting loss of the student's ability to protect himself or herself--is also the basis for the similar duty of an innkeeper to protect guests from the criminal actions of third parties. *Hutchins*, 116 Wash.2d at 228, 802 P.2d 1360 (citing *Joseph A. Page, Premises Liability* § 11.2, at 292 (2d ed.1988)).

Other relationships falling into the general group of cases where the defendant has a special relationship with the victim are also protective in nature, historically involving an affirmative duty to render aid. The defendant may therefore be required to guard his or her charge against harm from others. Thus a duty may be owed from a carrier to its passenger, from an employer to an employee, from a hospital to a patient, and from a business establishment to a customer.

Hutchins, 116 Wash.2d at 228, 802 P.2d 1360 (citing *W. Page Keeton et al., Prosser and Keeton on Torts* § 56, at 383 (5th ed.1984)). [1]

The special relationship which is most analogous to the [131 Wn.2d 45] relationship at issue here is the relationship between a hospital and its patients. In *Hunt v. King County*, 4 Wash.App. 14, 481 P.2d 593, review denied, 79 Wash.2d 1001 (1971), a disturbed and suicidal patient was admitted to the

psychiatric ward of a county hospital. The patient was injured when he found an open window and jumped five stories to the ground. The Court of Appeals held that the hospital owed the patient a duty of care which included a "duty to safeguard the patient from the reasonably foreseeable risk of self-inflicted harm through escape." Hunt, 4 Wash.App. at 20, 481 P.2d 593.

In Shepard v. Mielke, 75 Wash.App. 201, 205, 877 P.2d 220 (1994), the Court of Appeals recognized that a convalescent center had a general duty to protect its vulnerable residents. The plaintiff in Shepard had suffered brain damage and was entrusted to Manor Care, a convalescent center, where she was sexually assaulted by a visitor. The Court of Appeals observed that Ms. Shepard could not lock her door, screen visitors, or generally provide for her own safety. She was in Manor Care precisely because she was unable to perform these tasks for herself. Manor Care, like other nursing homes, holds itself out to the public as willing and able to provide these services, for a fee.

Shepard, 75 Wash.App. at 205-06, 877 P.2d 220. As a result, the convalescent home owed its resident a duty to protect her from reasonably foreseeable risks of harm, including criminal actions by visitors.

And at 425

Vicarious liability, otherwise known as the doctrine of respondeat superior, imposes liability on an employer for the torts of [929 P.2d 426] an employee who is acting on the employer's behalf. Where the employee steps aside from the employer's purposes in order to pursue a personal objective of the employee, the employer is not vicariously liable. Kuehn v. White, 24 Wash.App. 274, 277, 600 P.2d 679 (1979). Whether or not the employer has any particular relationship to the victim of the employee's negligence or intentional wrongdoing, the scope of employment limits the employer's vicarious liability. However, the scope of employment is not a limit on an employer's liability for a breach of its own duty of care.

Even where an employee is acting outside the scope of employment, the relationship between employer and employee

gives rise to a limited duty, owed by an employer to foreseeable victims, to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others. This duty gives rise to causes of action for negligent hiring, retention and supervision. Liability under these theories is analytically distinct and separate from vicarious liability. These causes of action are based on the theory that "such negligence on the part of the employer is a wrong to [the injured party], entirely independent of the liability of the employer under the doctrine of respondeat superior." *Scott v. Blanchet High Sch.*, 50 Wash.App. 37, 43, 747 P.2d 1124 (1987) (quoting 53 Am.Jur.2d Master and Servant § 422 (1970)), review denied, 110 Wash.2d 1016 (1988).

Washington cases have generally held that an employer is not liable for negligent supervision of an employee unless the employer knew, or in the exercise of reasonable

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care should have known, that the employee presented a risk of danger to others. In *Thompson v. Everett Clinic*, 71 Wash.App. 548, 860 P.2d 1054 (1993), review denied, 123 Wash.2d 1027, 877 P.2d 694 (1994), the court found no evidence that the health clinic knew or should have known of a physician's inappropriate sexual conduct in treating patients. *Thompson*, 71 Wash.App. at 555, 860 P.2d 1054. In *Peck v. Siau*, 65 Wash.App. 285, 289-90, 827 P.2d 1108, review denied, 120 Wash.2d 1005, 838 P.2d 1142 (1992), there was no evidence that school district knew or should have known that a teacher constituted a danger to students. *Elmview* relies on *Thompson* and *Peck*, arguing that if the facts do not support a cause of action for negligently supervising *Quevedo*, *Elmview* is not liable for failing to protect *Niece*. [6]

This argument is based on an incorrect understanding of the duty that gives rise to a cause of action for negligent supervision of employees. The theory of liability for negligent supervision is based on the special relationship between employer and employee, not the relationship between group home and resident. [7] Cases like *Thompson* and *Peck*, which define the scope of an employer's duty to control its employees for the protection of third parties, do not inform the scope of the duty of care owed by *Elmview* to *Niece*

by virtue of Elmview's special relationship to her. While an employer generally does not have a duty to guard against the possibility that one of its employees may be an undiscovered sexual predator, a group home for developmentally disabled persons has a duty to protect residents from such predators regardless of whether those predators are strangers, visitors, other residents, or employees.

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The scope of Elmview's duty of care--foreseeability:

The duty to protect another person from the intentional or criminal actions of third parties arises where one party is "entrusted with the well being of another." Lauritzen, 74 Wash.App. at 440, 874 P.2d 861. Given Niece's total inability to take care of herself, Elmview was responsible for [929 P.2d 427] every aspect of her well being. This responsibility gives rise to a duty to protect Niece and other similarly vulnerable residents from a universe of possible harms. This duty is limited only by the concept of foreseeability. Christen v. Lee, 113 Wash.2d 479, 492, 780 P.2d 1307 (1989). (Emphasis added.)

Shelton School District employed Suzan Montano-Felton as a driver of a school bus. That vehicle, as with any vehicle, is a dangerous weapon in the wrong hands. Ms. Montano-Felton had a history of inattentive driving, to the point that children were injured in her care, a pedestrian on the street was injured by her failure to exercise due caution. Shelton School District had knowledge that Suzan Montano-Felton was violating school and state requirements regularly with regard to cell phone use while operating their vehicle, and unplugging the bus' camera, a surveillance tool that was to provide them with opportunity to monitor her

actions yet, they failed to take any action to stop her autonomous behavior and/or to protect those in harm's way from her actions.

The court in *Niece*, Supra, at page 427 further defined negligent supervision as follows:

NEGLIGENT SUPERVISION

The theory of negligent supervision creates a limited duty to control an employee for the protection of third parties, even where the employee is acting outside the scope of employment.

A master is under a duty to exercise reasonable care so [as] to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) the servant

- (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
- (ii) is using a chattel of the master, and

(b) the master

- (i) knows or has reason to know that he has the ability to control his servant, and
- (ii) knows or should know of the necessity and opportunity for exercising such control.

(Emphasis added.)

...Washington cases have generally interpreted the knowledge element to require a showing of knowledge [929 P.2d 428] of the dangerous tendencies of the particular employee. Thompson v. Everett Clinic, 71 Wash.App. 548, 860 P.2d 1054; Peck v. Siau, 65 Wash.App. 285, 827 P.2d 1108. (Emphasis added.)

And at 428

The Nondelegable Duty Theory in Washington:

An early Washington case, *Marks v. Alaska S.S. Co.*, adopts the historical exception [929 P.2d 429] for common carriers. *Marks v. Alaska S.S. Co.*, 71 Wash. 167, 127 P. 1101 (1912) (citing 3 Seymour D. Thompson, *Law of Negligence* § 3166 p. 623 (1902)). [11] But the issue is whether the nondelegable duty should be extended to special relationships other than the relationship between common carriers and passengers. No recent Washington cases have used the nondelegable duty theory to hold an employer liable for an employee's intentionally tortious or criminal conduct outside the scope of employment. [12]

Niece contends this court adopted the nondelegable duty theory in the 1967 case of *Carabba v. Anacortes Sch. Dist.* No. 103, 72 Wash.2d 939, 435 P.2d 936 (1967). In *Carabba*, a student wrestler alleged that his injuries were caused by the negligence of the referee, a member of an independent group of volunteer referees. Noting that the district owed the student a duty of protection, the court concluded that this duty was nondelegable and the district was therefore liable. *Carabba*, 72 Wash.2d at 957-58, 435 P.2d 936.

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Our holding that the district's duty of protection was nondelegable was largely based on the Restatement (Second) of Agency § 214 (1958).

A master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance of such duty to a servant or other person is subject to liability to such others for harm caused to them by the failure of such agent to perform the duty. (Emphasis added.)

It is clear that the lack of action of Ms. Montano-Felton's employer, Shelton School District, was sufficient for the jury to find defendant Shelton School District was negligent. That negligence was the proximate cause of injury and damages that resulted in the foreseeable harm to another based on the escalating actions of Suzan Montano-Felton. In this case, Kahil Marshall died.

Inasmuch as the jury found defendant Shelton School District negligent, and so it should have, in doing so, the jury should have transferred the same standard to defendant Suzan Montano-Felton for her actions, and further found that said negligence was a proximate cause in the injury and damages that contributed to the death of Kahil Marshall on October 27, 2010.

B. The court erred when it submitted a Special Verdict form to the jury for their use that contained specific language setting one defendant apart from the others. Defendant Nathan Wright, it was specifically noted on the form in several places, was not to be considered because:

A default judgment has been entered against him, therefore no determination need be made.

This biased and specific language was included in all three questions:

1. Were any of the defendants negligent?

2. Was such negligence a proximate cause of injury and damage to the plaintiff?
3. What do you find to be plaintiff's amount of damages?

This specific language prejudiced the jury as to Nathan Wright and that prejudice set him apart from the other defendants. It can then only be found that the jury determined the presumption that he was wholly negligent and that his negligence was the proximate cause of the injury and damage caused to Plaintiff herein, that because of the court's specific language, he was not to be included in any deliberations as to negligence or damages to be awarded to the plaintiff, and therefore, made no award for damages whatsoever. This is irreconcilable. The harm is immense.

In *K.H. v. Olympia School District*, 48583-4-II, appellant raised the issue of irreconcilable harm because of specific language contained in the Special Verdict interrogatories proposed to the jury.

On December 17, the jury returned a special verdict form in which it answered, "Yes" to the questions of whether the District was negligent or grossly negligent and whether such negligence or gross negligence was "a proximate cause of injury or damage to the [Appellants]." CP at 6447-48. However, the jury found the measure of each of the Appellants' damages "proximately caused by" the District to be "\$0" in response to three separate interrogatories. CP at 6449. After the jury returned its verdict and was polled, neither party raised any issues to address, and the trial court recessed. (Emphasis added.)

The trial court denied the Appellants' motion for a new trial. The trial court disagreed that the Appellants had waived the argument.

Further, the trial court determined that the jury's verdict was internally consistent on the basis that either the jury believed that there were no damages caused solely by the District and not also by Shafer or that the jury determined there was no proof of monetary value of any injury caused by the District.

VI. Attorney Fees Request

After trial, the Appellants moved for fees and costs and argued that fees were appropriate under CR 37(c)[8] because the Appellants' requests for admissions[9] had sought the District's "opinion with regard to the application of law to fact." CP at 6703. The District responded that it had properly refused to "admit negligence" and that the requests were improper because they required the District to admit a legal conclusion. CP at 7431. The District also noted that it was not required to admit factual matters central to the lawsuit. The trial court denied the Appellants' fee request.

ANALYSIS

I. Motion for a New Trial A. No Waiver

The District argues that the Appellants waived their arguments that the verdict was irreconcilable because the Appellants failed to object while the jury was still impaneled. We disagree.

The existence of a waiver is a mixed question of fact and law that, where the facts are undisputed, we review de novo. *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 440-41, 191 P.3d 879 (2008). We have noted inconsistency in cases deciding whether a party waived its challenge to a jury verdict when it did not raise the alleged inconsistency prior to the jury's discharge. *Mears v. Bethel Sch. Dist. No. 403*, 182 Wn.App. 919, 928, 332 P.3d 1077 (2014), review denied, 182 Wn.2d 1021 (2015). In *Mears*, we stated that *Gjerde v. Fritzsche*, a Division One case declining to consider a challenge to jury interrogatories, appeared to be limited to the circumstances presented: counsel who was silent in the face of actual knowledge of an inconsistency when it could be cured and remained silent in order to "try his luck with a

second jury.'" 182 Wn.App. at 929 n.2 (quoting 55 Wn.App. 387, 394, 777 P.2d 1072 (1989)).

Here, after the jury returned the special verdict and was polled, the Appellants did not object to the verdict. The Appellants first argued that the verdict was irreconcilable in their new trial motion. When the District subsequently argued that the Appellants had waived their objection, the trial court correctly determined that there is no absolute standard that a party waives its claim of an irreconcilable verdict when it fails to raise the issue before the jury's discharge. See Mears, 182 Wn.App. at 928. (Emphasis added.)

... On appeal, the District claims that here, there was actual knowledge of an inconsistency and that this is a situation where counsel remained silent despite actual knowledge in order to try his luck with a second jury. See Mears, 182 Wn.App. at 929 n.2 (quoting Gjerde, 55 Wn.App. at 394). The District points to the jury's question during deliberations: "In regards to Instruction 5, should [Shafer] be considered an employee of the [District] in determining negligence?" 11 RP at 2187. But in response to this question, the Appellants contended that it was unclear why the jury asked about negligence and argued against the District's speculation that the jury had found a flaw in the instructions. Thus, it is not clear that the Appellants remained silent despite actual knowledge of an inconsistency, and the rule from Gjerde does not apply. See Mears, 182 Wn.App. at 929 n.2. We hold that the Appellants did not waive their irreconcilable verdict argument.

B. Verdict Is Reconcilable

The Appellants argue that the jury's verdict was irreconcilable so that the matter must be reversed and remanded for a new trial on damages. We disagree.

1. Legal Principles

We generally review the denial of a motion for new trial for an abuse of discretion; however, where the trial court based its decision upon an issue of law, we review the issue de novo. Mears, 182 Wn.App. at 926-27. Where the jury's answers to a special

verdict cannot be reconciled, "[n]either a trial court nor an appellate court may substitute its judgment for that which is within the province of the jury" and "[t]he only proper recourse is to remand the cause for a new trial." Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 131, 875 P.2d 621 (1994) (alterations in original) (quoting Blue Chelan, Inc. v. Dep't of Labor & Indus., 101 Wn.2d 512, 515, 681 P.2d 233 (1984)). We have stated that "[i]n reviewing a verdict, an appellate court must try to reconcile the answers to special interrogatories." Alvarez v. Keyes, 76 Wn.App. 741, 743, 887 P.2d 496 (1995). And in reviewing the verdict, we read the verdict "as a whole, including instructions." Espinoza v. Am. Commerce Ins. Co., 184 Wn.App. 176, 197, 336 P.3d 115 (2014). (Emphasis added.)

4. Analysis

Here, the jury returned a verdict that the District had been both negligent and grossly negligent, that the negligence and gross negligence proximately caused "injury or damage to the [Appellants], " but that the "measure of [Appellants'] damages proximately caused by the [District]" was "\$0" for DH, DH's mother, and DH's father. CP at 6448-49. These answers to the special verdict are reconcilable under the instructions because the jury could have determined that the District was liable, yet that the Appellants had proved no legally compensable damages.

The Appellants contend that the verdict is irreconcilable under this theory because the jury could not have found that the Appellants had proven damage proximately caused by the District but then awarded nothing in compensation. We disagree with this argument; nothing in the jury instructions foreclosed the jury from determining that the Appellants had suffered injuries or damages yet assessing that the legally compensable value of the injury or damages was "\$0." For instance, although instruction 6 stated that the Appellants claimed that the District's negligence caused the Appellants' "injuries and damages" (CP at 6420) and instruction 22 discussed whether the District's negligence was a "proximate

cause of injury or damage to the [Appellants]" (CP at 6436), instruction 28 told the jury,

If your verdict is for the [Appellants], then you must determine the amount of money which will reasonably and fairly compensate the [Appellants] for such damages as you find were proximately caused by the [District].

The burden of proving damages rests with the [Appellants] and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

CP at 6442-43. Thus, the instructions allowed the jury to conclude that even if it found that the District was liable, the jury could decline to award damages to the Appellants if the jury was not convinced that the Appellants had proven that the amount of compensation they were entitled to was greater than "\$0." (Emphasis added.)

When we review whether the answers to a special verdict are reconcilable under the instructions and the verdict as a whole, we must try to reconcile the answers where possible. See Alvarez, 76 Wn.App. at 743. Here, the jury's verdict may be reconciled under the District's theory that the jury decided that the value of the Appellants' damages was "\$0." We reject the Appellants' arguments that a new trial should have been granted because the verdict was irreconcilable.[10]

In that case, the court found no irreconcilable harm as the jury made a specific finding of damages - \$0.

In the case at bar, the jury did not make an award of any nature. The jury simply stopped after Question 2 and failed to complete any response to Question 3. They are remiss in completing their duty.

No one can stand in the place of the jury. Not the plaintiff nor defendants, nor this court. One can only know that something influenced the jury to stop at that point and, accordingly, one can only assume the jury believed that defendant Nathan Wright bore the burden as a whole for any negligence as the proximate cause of injury and damages owing to the plaintiff because he “defaulted” in responding to the Summons and Complaint prior to trial and was effectively silenced as to his defense.

The jury’s failure to do its job to completion is irreconcilable, and its verdict is void on its face.

D. The court erred in not entering an award for damages against defendants SHELTON SCHOOL DISTRICT and SUZAN MONTANO-FELTON, despite finding Shelton School District to be negligent. (CP at 24-25)

Further, the court did not establish, prior to trial that the parties would individually be subject to damages. (CP at 77) The court’s verdict did not differentiate that the Shelton School District’s negligence did not coincide with the negligence of defendants Suzan Montano-Felton or Nathan Wright. The court entered a judgment against Nathan Wright by default (CP at 479-480), and found Shelton School District negligent. (CP at 50) Therefore, the award of damages is jointly and severally unless otherwise distinguished as individual prior to the court’s verdict.

The court holds in *Kottler v. State*, 136 Wn.2d 437, 963, P.2d 834 (1998) that:

RCW 4.22.070, which generally abolishes joint and several liability, retains it in but three areas, one of which must exist for a contribution action to survive. See Washburn, 120 Wash.2d at 294, 840 P.2d 860 (no right to contribution against defendants who settled Before trial because no RCW 4.22.070 exception applies); Gerrard, 122 Wash.2d at 298, 857 P.2d 1033 (same). See also Stewart A. Estes, *The Short Happy Life of Litigation Between Tortfeasors: Contribution, Indemnification and Subrogation After Washington's Tort Reform Acts*, 21 Seattle U.L.Rev. 69, 70 (1997) ("[U]nless an exception to the general rule of proportionate liability exists, a third-party complaint for contribution has no legal basis.").

First, modified joint and several liability is retained where the negligent parties were acting in concert or where there was a master/servant or principal/agent relationship at play. RCW 4.22.070(1)(a).

Second, full joint and several liability remains the rule in cases involving hazardous waste, tortious interference with business, and unmarked fungible goods such as asbestos. RCW 4.22.070(3)(a)-(c).

Third, a limited form of joint and several liability is retained where the plaintiff is fault-free and judgment has been entered against two or more defendants. (Emphasis added.)

This exception,[963 P.2d 840] set forth in RCW 4.22.070(1)(b), provides:

If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.

This modified joint and several liability differs from

traditional joint and several liability in three respects. First, it arises only if plaintiff is fault-free. Second, parties held jointly and severally liable will be jointly and severally liable only for the sum of their proportionate liability. See Washburn, 120 Wash.2d at 298, 840 P.2d 860. Third, the only parties that 136 Wn.2d 447 will be jointly and severally liable are "the defendants against whom judgment is entered." RCW 4.22.070(1)(b). Settling parties, released parties, and immune parties are not parties against whom judgment is entered and will not be jointly and severally liable under RCW 4.22.070(1)(b). Washburn, 120 Wash.2d at 294, 840 P.2d 860; Anderson, 123 Wash.2d at 852, 873 P.2d 489 (a released party "cannot under any reasonable interpretation of RCW 4.22.070(1)(b) be a defendant against whom judgment is entered."). Likewise, parties not named in the underlying suit are not "defendants against whom judgment is entered." [9]

The Legislature determined under RCW 4.22.070 that:

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another

party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060. (Emphasis added.)

The court did not find that Ms. Marshall contributed to the negligence that took her life on October 27, 2010.

The Court held in *Hynek v. City of Seattle*, 7 Wn.2d 386 (Wash. 1941, 27905 that:

“Restatement of the Law, Torts, p. 1227, § 463, defines 'contributory negligence' as follows: 'Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection and which is a legally contributing cause, co- operating with the negligence of the defendant in bringing about the plaintiff's harm.'"

It is said in the comment: 'Contributory negligence differs from that negligence [111 P.2d 252] which subjects the actor to liability for harm done to others in one important particular. Negligence is conduct which creates an undue risk of harm to others. Contributory negligence is conduct which involves an undue risk of harm to the person who sustains it. In the one case the reasonable man, whose conduct furnishes the standard to which all normal adults must conform, is a person who pays reasonable

regard to the safety of others; in the other, the reasonable man is a reasonably prudent man, who as such pays reasonable regard to his own safety.

In § 465, the Restatement says: "The plaintiff's negligent exposure of himself to danger or his failure to exercise reasonable care for his own protection is a legally contributing cause of his harm if, but only if, it is a substantial factor in bringing about his harm and there is no rule restricting his responsibility because of the manner in which his conduct contributed to his harm."

The principal case upon which the doctrine of contributory negligence is founded is that of *Butterfield v.*

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Forester, 11 East. 60, 61, 103 Reprint 927, 19 E.R.C. 189, in which Lord Ellenborough said: 'One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the default of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.'

In 45 C.J. 941, 942, and 943, we find the following:

'The doctrine of contributory negligence rests in the law of tort as applied to negligence, and is governed by the principles peculiarly applicable to that branch of jurisprudence.

'Different reasons have been assigned by the courts as the basis of that doctrine that contributory negligence bars recovery for injuries negligently inflicted. It has been asserted that it is an application of the doctrine of proximate cause; that it is founded upon the ground that the law will not undertake to apportion the consequences of concurring acts of negligence; and that it is an application of the rule, expressed in the maxim, *Volent non fit injuria*, that one who invites an injury cannot make it the basis of recovery. Still another view finding favor with the courts is that the rule precluding recovery is in the nature of a penalty, established by public policy, to admonish all to use due care for their own safety. In other words, the doctrine is said to be founded on the impolicy of allowing a party to recover his own wrong, and the policy of making personal interests of men dependent upon their own prudence and care.

... 'Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for

which defendant is responsible, contributes to the injury complained of as a proximate cause. Contributory negligence is usually the personal default of plaintiff; and it must be either his own or that of someone whose negligence is legally attributed to him.

In this present case, the deceased contributed nothing that would cause her own death. Negligence and the ability to exercise reasonable care for her own protection did not rest in the hands of Kahil Marshall, and ultimately her estate. Plaintiff should not, therefore, be restricted from receiving damages.

C. The trial court erred in limiting the type of damages the plaintiff could present. (Verbatim Report of Proceedings at 496 - 504) Upon her death, Kahil Marshall left behind five children, daughters, Brittani Marshall, age 22, Brianna P. Chandler, age 20, three minor daughters: Kyesha Pringle, age 14 and twins, Jessa B. Marshall and Jazmyn M. Marshall, both age 12. Those children were entitled to compensation for the loss of financial provision and for the loss of love and affection. Plaintiff further sought additional compensation for decedent's grandchildren, using current child care rates as a measure of their loss. The court denied these expenses over plaintiff's objection. The trial court failed to make any award on behalf of the decedent's children or grandchildren for their loss. (CP at 4-8; 51)

In *Hinzman v. Palmanteer*, 81 Wn.2d 327, 501 P.2d 128 (Wash. 1972), the court found

Shortened life expectancy caused by the child's death and the resulting loss of value of her future earning capacity to her estate are specifically recognized as items of recovery not excluded by statute.

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Warner v. McCaughan, 77 Wash.2d 178, 183, 460 P.2d 272 (1969) We there noted that damages to the deceased include "an allowance for prospective loss of earnings during his normal life expectancy, discounted to present worth, and with such other adjustments as the facts may require."

...The courts, however refuse to deny recovery for that reason. *Cox v. Remillard*, 237 F.2d 909 (9th Cir. 1956); *Lane v. Hatfield*, 173 Or. 79, 143 P.2d 230 (1943). In *Cox*, the court noted it was impossible to furnish all of the proof of anticipated earnings and savings which might be furnished in the case of an adult, but that circumstance does not mean that no damages whatever can be recovered . . .

Cox v Remillard, Supra, at page 911. The court further indicated that, in cases of this character, it is not possible to prove damages with any approximation of certainty and the jury must estimate the damages the best they can by reasonable probabilities, based on their sound judgment as to what

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Would be just and proper under all of the circumstances. The court held it to be unnecessary for a witness to name a specific sum as the precise amount of the damages suffered.

...Before the jury, and the ultimate assessment of damages is one a reviewing court can control. *Clark v icicle Irr. Dist.*, 72 Wash.2d 201, 432 P.2d 541 (1967); *Rohlfing v. Moses Akiona, Ltd.*, 45 Haw. 373, 369 P.2d 96 (1961); *Alleva v. Porter*, 184 Pa.Super. 355, 134 A.2d 501 (1957).

The jury had a duty to award damages to the plaintiff. The defendants should be jointly and severally liable for any damages awarded. The plaintiff was entitled to damages but the jury ignored their

duty to make any award and therefore did not address the issue of damages when they made no award of any amount, nor did they provide a division of damages between the defendants.

The jury in the case before this court failed in their duty. They failed to render any decision, effectively ignoring and remaining silent as to whether plaintiff was entitled to damages or not entitled to damages. This is irreconcilable.

D. The trial court erred in denying Plaintiff's motion for an Order Setting Aside the Jury Verdict and entering a Judgment Notwithstanding the Verdict or in the alternative, granting Plaintiffs a new trial. (CP at 4-8; 26-32)

The trial court erred in that it abused its discretion by excluding defendants, SUZAN MONTANO-FELTON and SHELTON SCHOOL DISTRICT by deeming their negligence was the proximate cause of injury and damages that resulted in the death of KAHIL MARSHALL and thereby making any award of damages based on that finding. The trial court entered a Special Verdict finding defendant Shelton School District negligent but not finding that negligence was a proximate cause of injury and damage to the Plaintiff in regarding Ms. Marshall's death, and Nathan Wright, guilty by default entered against him prior to the trial.

While it is long established that a trial court's decision cannot be reversed absent a showing of an abuse of discretion, *Huntington v. Clallam Grain Co.*, 175 Wn. 310, 27 P.2d 583, this principle is subject to the limitation that, to the extent that such an order is predicated upon rulings as to the law, as such those involving the admissibility of the evidence or the correctness of an instruction, no element of discretion is involved. *Grant v. Huschke*, 70 Wn. 174, 126 P. 416 (1912), overruled on other grounds *Larson v. City of Seattle*, 25 Wn. 2d 291, 171 P.2d 212(2006); *Hayes v. Sears, Roebuck & Co.*, 34 Wn.2d 666, 209 P.2d 468 (1949). Action of lower court will not be interfered with unless abuse of discretion appears. *Danielson v. Carstens Packing.*, 115 Wn. 516, 197 P. 617 (1921); *Potts v. Laos*, 31 Wn.2d 889, 200 P.2d 505 (1948); *Rettinger v. Bresnahan*, 42 Wn.2d 631, 257 P.2d 633 (1953). Indeed, a much stronger showing of an abuse of discretion will ordinarily be required to set aside an order granting a new trial than one denying it. *McUne v. Fuqua*, 42 Wn.2d 65, 253 P.2d 632 (1953).

A trial court abuses its discretion when its decision “is manifestly unreasonable or based upon untenable grounds or reasons.” *Salas v. Hi-Tech Erectors*, 168 W.2d 664, 668, 230 P.3d583 (2010). “A trial court’s decision is manifestly unreasonable if it “adopts a view “that no reasonable person would take.” *In re Pers. Restraint of Duncan*, 167

Wn.2d 398, 402-03, 219P.3d 666 (2009) (quoting *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d, 115 (2006) (quoting *State v. Rohrich*, 149 Wn2d 647, 654, 71 P.3d 638 (2003))). “A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts.” *Id.* (citing *Mayer*, 156 Wn.2d at 684, 132, P.3d 115).

A Judgment as a Matter of Law is available under CR 50 and a new trial is available under CR 59(a) (7) if “there is no evidence of reasonable inference from the evidence to justify the verdict or the decision, or [the verdict] is contrary to law.”

The court held in *O’Brien v. American Casualty Co., et al*, 58 Wash. 477, 109 P.52 (Wash. 1910) at 477

The Court below was of the opinion that the Hospital Association and the Casualty Company were not jointly liable, and instructed the jury accordingly. The findings against each of these respondents was therefore for its own negligence only, and not for the negligence of the other. On the other hand, the finding against the Respondent Wheeler was for his negligence, “individually and not as agent or servant or employ of the other defendants.” To render a joint and several judgment against several respondents on such a verdict would be, first, to render judgment against the Hospital Association and the Casualty Company for damages resulting from the negligence of the respondent Wheeler individually and not as their agent, servant, or employ, second, to render judgment against respondent Wheeler for the negligence of the other respondents, other than through his own acts; and third, to render judgment against each corporation for the negligence of the other. For the like reason, a joint and several judgment in the sum of \$5,000 should not be rendered against the Hospital

Association and Wheeler, or a joint and several judgment in the sum of \$2,000 against all three respondents. (Emphasis added.)

And at page 484

As already stated, the gravamen of the appellant's case under his complaint and testimony was the negligence and incompetency of the respondent Wheeler, and, unless that fact was found against each of the other respondents, the testimony would not sustain any considerable judgment against them. The permanent injury to the appellant resulted from the negligence and incompetency of the respondent Wheeler, if it resulted from negligence at all, and, in the absence of a finding fixing the responsibility for such negligence on either the Hospital Association or the Casualty Company, or both, no verdict such as was here returned should be permitted to stand.

From careful consideration of the entire record, we are convinced that there was a substantial mistrial in the court below, and that a new trial should be awarded here. It is so ordered. (Emphasis added.)

In the case at bar, the verdict rendered herein found one defendant not negligent, one defendant negligent, but that their negligence was not a proximate cause of injury and damage to the plaintiff, and one defendant guilty by default. (CP at 50-51) All of the defendants were guilty of negligence as a proximate cause in the injury and damage to the plaintiff which was the death of Kahil Marshall. The jury failed in their duty to make any determination and therefore, the court had a duty to grant the Plaintiff's motion make an award for damages or in the alternative, order a new trial. The court's denial was a denial of justice in this matter.

VI. CONCLUSION

The plaintiff is entitled to just compensation for the negligence of the defendants which was the proximate cause of injury and damages resulting in the death of Kahil Marshall, including but not limited to presumptive lost earnings, loss of the parent-child relationship and loss of consortium. Said damages should be awarded because of the negligence of all of the defendants herein.

Given the jury's utter failure to complete their duty, to make any decision as to an award for damages, the plaintiff is entitled to a judgment as a matter of law or in the alternative, a new trial as the jury's verdict in this matter was not supported by substantial evidence that was presented at trial.

The plaintiff is also entitled to and hereby requests that the Court award all reasonable attorney fees and costs incurred herein. This request is pursuant to RAP 14.2, which states:

RULE 14.2

WHO IS ENTITLED TO COSTS

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f), unless the commissioner or

clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. The commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A "nominal party" is one who is named but has no real interest in the controversy.

[Adopted effective September 1, 1998; amended effective January 31, 2017.]

and RAP 18.1, which states:

RULE 18.1

ATTORNEY FEES AND EXPENSES

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court, except as stated in section (j). The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

(c) Affidavit of Financial Need. In any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses, each party must serve upon the other and file a financial affidavit

no later than 10 days prior to the date the case is set for oral argument or consideration on the merits; however, in a motion on the merits pursuant to rule 18.14, each party must serve and file a financial affidavit along with its motion or response. Any answer to an affidavit of financial need must be filed and served within 7 days after service of the affidavit.

(d) Affidavit of Fees and Expenses. Within 10 days after the filing of a decision awarding a party the right to reasonable attorney fees and expenses, the party must serve and file in the appellate court an affidavit detailing the expenses incurred and the services performed by counsel.

(e) Objection to Affidavit of Fees and Expenses; Reply. A party may object to a request for fees and expenses filed pursuant to section (d) by serving and filing an answer with appropriate documentation containing specific objections to the requested fee. The answer must be served and filed within 10 days after service of the affidavit of fees and expenses upon the party. A party may reply to an answer by serving and filing the reply documents within 5 days after the service of the answer upon that party.

(f) Commissioner or Clerk Awards Fees and Expenses. A commissioner or clerk will determine the amount of the award, and will notify the parties. The determination will be made without a hearing, unless one is requested by the commissioner or clerk.

(g) Objection to Award. A party may object to the commissioner's or clerk's award only by motion to the appellate court in the same manner and within the same time as provided in rule 17.7 for objections to any other rulings of a commissioner or clerk.


(h) Transmitting Judgment on Award. The clerk will include the award of attorney fees and expenses in the mandate, or the certificate of finality, or in a supplemental judgment. The award of fees and expenses, including interest from the date of the award by the appellate court, may be enforced in the trial court.

(i) Fees and Expenses Determined After Remand. The appellate court may direct that the amount of fees and expenses be determined by the trial court after remand.

(j) Fees for Answering Petition for Review. If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review. The Supreme Court will decide whether fees are to be awarded at the time the Supreme Court denies the petition for review. If fees are awarded, the party to whom fees are awarded should submit an affidavit of fees and expenses within the time and in the manner provided in section (d). An answer to the request or a reply to an answer may be filed within the time and in the manner provided in section (e). The commissioner or clerk of the Supreme Court will determine the amount of fees without oral argument, unless oral argument is requested by the commissioner or clerk. Section (g) applies to objections to the award of fees and expenses by the commissioner or clerk.

[Amended to become effective December 29, 1998; December 5, 2002; September 1, 2003; September 1, 2006; September 1, 2010]

RESPECTFULLY SUBMITTED this 11th day of September, 2017.


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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I arranged for the originals of the preceding Appellant's Brief to be filed electronically and by US Mail, postage prepaid, in Division II of the Court of Appeals at the following address:

Court of Appeals of Washington, Division II
950 Broadway, Ste. 300
Tacoma, WA 98402

And that I arranged for a copy of the preceding Appellant's Brief to be served on Respondents by service on Brian A. Christensen, counsel for Respondents via email at:

b.christensen@jmlawps.com

DATED this 11th day of September, 2017 at Shelton, Washington.

/s/ SUSAN F. BURNS

JEANETTE W. BOOTHE INC PS

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